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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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ARGUMENT

The Brief of the United States in Opposition acknowledges that legal issues of major importance have been involved in this case. [Brief in Opposition, pp. 11, 14 n8] Nonetheless, it asserts that review by this Court is inappropriate because, it asserts, the decision of the Court of Appeals was based not on the constitutional issues of the case but on a "fact-bound" review of the provisions of the consent decree. [Brief in Opposition, pp. 12-15] The United States, moreover, submits that the decision is correct in that it is consistent with the ordinary understanding of the meaning of "available" funds. [Brief in Opposition, p. 15]

The Brief of the United States in Opposition fails to deal with the central issues presented by the decision below. In its desire to present the decision of the Court of Appeals as a modest and reasonable interpretation of the decree, the United States simply fails to deal with the heart of that decision—the holding that the Executive Branch has the discretionary power to decide whether or not to provide the Board with its equitable share of *funds which were appropriated* for purposes which include school desegregation.

The Board also submits that the central aspects of the decision of the Court of Appeals were indeed constitutionally derived. In any event, and more significantly, the decision of the Court of Appeals raises important governmental powers issues, whether it is read as based on a textual interpretation of the consent decree or on underlying constitutional requirements.

1. The Brief of the United States in Opposition Fails to Present the Key Aspects of the Decision Below as to Which Review is Sought.

The United States describes the decision below as simply requiring the United States under the consent decree to provide the Board with an equitable share of the amounts appropriated by Congress for purposes which could be used for the Board's desegregation plan. [Brief in Opposition, p. 15] Had this been the holding, the Board would not be seeking review. The Board has never claimed that it has the right to receive funds not appropriated by Congress for purposes which comprise the activities of the desegregation plan. Neither has it contended that it is entitled to all of the available desegregation funds without regard to the needs of other school districts.

However, what the Court of Appeals ruled is that the Executive Branch was entitled, in the exercise of its own discretion, to decide *not* to provide to the Board funds which *were* appropriated by Congress for purposes which comprise the elements of the Board's desegregation plan. There have been

very substantial amounts appropriated by law for purposes which include school desegregation but as to which the Executive Branch has decided not so to use.

The Court of Appeals held that the obligation of the United States would be satisfied if the Board were to

> be funded on a priority basis under existing school desegregation programs, *the amount of which funding is determined by program criteria* [to be determined by the Executive Branch]. . . . (Appendix, p. 11a, emphasis supplied)

This holding leaves it open to the Executive Branch, unless compelled by the terms of an appropriation law, to decide whether appropriated money should be used for funding the Board's plan. Thus, for example, it was held not a bad faith violation of the decree for the Executive Branch to decide that none of the Discretionary Fund (which the authorizing legislation allows to be used for desegregation purposes) would be used for the Board's plan [Appendix, p. 14a n.10] or to decide that none of the Title IV desegregation appropriations would be used for a grant to the Board for the plan [Appendix, p. 14a]

In each of these respects, the decision of the Court of Appeals in essence upheld the argument of the government that only funds which the Executive Branch decides, regardless of appropriation by Congress, should be spent for Chicago school desegregation were "available" for that purpose. The Brief of the United States, by not focusing on this key aspect of the decision, has failed adequately to address the actual issues pending before this Court.

2. The Decision of the Court of Appeals is Inconsistent with the United States' Own Understanding of the Phrase "Available Funds."

The Brief in Opposition [p. 15] asserts that the interpretation given the decree by the Court of Appeals was correct in that it coincides with the common meaning given the phrase

"available funds." "Available funds" are said to be those amounts which

> have been appropriated for a given purpose by Congress. . . . Unless funds have been appropriated for that purpose and that time, they are not "available" as that term is ordinarily understood. [Brief in Opposition, p. 15]

In fact, however, this is not the interpretation given the consent decree by the Court of Appeals. It held in effect that available funds are not those appropriated by Congress for the purpose in question, but rather those which are so appropriated *and* which the Executive Branch, in its discretion, decides to use for that particular purpose. Ironically, the Court of Appeals' interpretation of the consent decree is thus contrary to the interpretive standard put forward by the United States in its own Brief claiming the decision was correct.

3. The Decision of the Court of Appeals Was Constitutionally Based.

The Brief in Opposition is similarly off the mark when it states that the interpretation put on the consent decree was not constitutionally based (although, the Brief [p. 13, n.7] acknowledges, it might have been). The assertion of the Brief in Opposition [p. 12] that "petitioner cannot point to a single word in the court's opinion indicating that such [constitutional] considerations played any role in its construction of the meaning of the consent decree" is erroneous. The decision of the Court of Appeals concerning the exercise of Executive discretion does speak in terms of interpreting the words of the decree, but the Court appears to have indicated that its interpretation derived from constitutional concerns. (Contrary to the argument of the Brief in Opposition [p. 15], the holding on the Executive discretion point was not based on "factbound" extrinsic evidence of intent, but was a direct textual inter-

pretation.* The Court of Appeals decisions do indeed indicate that this holding was constitutionally rooted.)

The Court of Appeals in its first decision indicated that constitutional questions attended an interpretation of the decree that limited overall policy decisions by the Executive Branch.

> A significant constitutional issue may exist as to whether a finding of lack of good faith can be based upon such a series of sweeping Executive policy decisions and recommendations. [Appendix, p. 276a]

In summing up its second decision, the Court of Appeals further indicated that constitutional forces were in play in its decision as to the ability of the United States to exercise its discretion to make funds unavailable to the Board.

> In the circumstances of this case, we deem it important to note that the actions of the Executive Branch *could be interpreted to contravene the spirit of the Decree. Such actions while perhaps within constitutional limits,* cannot enhance the respect to which this Decree is entitled and do not benefit a signatory of the stature of the United States Department of Justice. [Appendix, p. 17a, emphasis supplied]

4. Whether the Decision Below is Read as Being Constitutionally or Textually Based, it Nonetheless Raises Significant Issues Appropriate for Review by this Court.

Regardless of its sources, the decision of the Court of Appeals means that which funds are provided for the Board's plan rests in the exercise of discretion of the Executive Branch. To posit such an exception to generally understood legal duties arising from a consent decree is to raise a substantial question as to the relative authority of the various branches of the

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* The extrinsic evidence regarding intent went to the issue of the obligation of the Executive Branch to seek legislation (also now presented for review), not the issue of Executive discretion.

government. In essence, it is to hold that the authority of the judiciary (and its enforcement of the law) must give way to the discretion of the Executive Branch. Such an interpretation, whether derived constitutionally or otherwise, presents a substantial issue concerning the legal powers of the respective branches of government which should be, but has not been, addressed by this Court.

The Brief in Opposition contents itself with arguing that the decision below was not plainly based on constitutional limitations. This is basically beside the point. The rule of law is undermined just the same where a doctrine of Executive discretion is read into the language of a decree as where it is thought to be constitutionally derived. In each instance, the Executive Branch is allowed to be the judge of the extent to which it will carry out the language of its obligations.

CONCLUSION

A Writ of Certiorari should issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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May, 1985